89-870

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE KIESEL COMPANY, INC.,
Petitioner,

vs.

KIMBERLY HOUSEHOLDER, SPECIAL AGENT,
FEDERAL BUREAU OF INVESTIGATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November, 1989

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QUESTIONS PRESENTED

1. Whether anomalous jurisdiction may be employed for pre-indictment relief from a facially overbroad search warrant, and, if so, whether the availability of post-indictment review precludes the exercise of anomalous jurisdiction or a Rule 41(e) motion to review the warrant prior to indictment.

2. Whether allegations of a pervasive pattern of illegality in one segment of a company's business are sufficient to establish and justify on "all records" search and seizure for all segments of the business.

LIST OF PARTIES

The parties to the proceedings below were Petitioner, The Kiesel Company, Inc.,[1] and Respondent, Kimberly Householder, Special Agent, Federal Bureau of Investigation. There are no additional parties to the proceeding before this Court.

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[1] Pursuant to Supreme Court Rule 28.1, The Kiesel Company, Inc. identifies the following as its affiliated corporations other than wholly owned subsidiaries: (1) Kiesel Enterprises, Inc. (parent); (2) Kiesel Marine Services, Inc; (3) B & C Sales, Inc; (4) L & L Rigging, Inc; (5) Branch Street Services, Inc; (6) Mississippi River Sand & Materials Co; (7) Berryfast, Inc; (8) Pala Oil Products, Inc; (9) Patgood, Inc; (10) American Waste Reclamation Co; (11) Goodsell, Inc; (12) Tool & Staple Supply Co. of America; (13) Major Cornerstone Supply USA, Inc; (14) Paramount Hauling; (15) Lindy Farms, Inc; (16) Ridgetop Farms, Inc; (17) Corkery Fuel & Materials; (18) Falcon Energy, Inc; (19) Falcon Energy Associates; and (20) J. W., Inc.

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KIMBERLY HOUSEHOLDER, SPECIAL AGENT,
FEDERAL BUREAU OF INVESTIGATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, The Kiesel Company, Inc., respectfuly prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 13, 1989.

OPINIONS BELOW

The opinion below of the Court of Appeals is reported as *The Kiesel Company v. Kimberly Householder,* 879 F.2d 385 (8th Cir. 1989), and appears in the Appendix hereto as Appendix A. The opinion of the United States District Court for the Eastern District of Missouri appears in the Appendix hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 13, 1989. A timely petition for rehearing *en banc* was denied on September 7, 1989, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RULE 41(e), FED. R. CRIM. P:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence of any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored, and it shall not be admissable in evidence at hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT OF THE CASE

On February 29, 1988, eleven federal agents from the Federal Bureau of Investigation and Environmental Protection Agency conducted a search of The Kiesel Company, Inc. ("Kiesel"). Kiesel is engaged in the coal, bulk hauling, marine services, oil, and waste oil business and had, prior to the search, an unblemished record for the almost 100 years the company and its predecessor has been in business. The agents seized the entire premises of Kiesel, interviewed employees, screened all telephone calls, obtained material samples, and reviewed thousands of documents at the corporate offices. No office or file cabinet was immune from the search; all corporate offices and records of Kiesel were examined and searched.

The search was conducted pursuant to the warrant attached hereto as Appendix C. The four-page property list attached to the warrant contains 17 paragraphs authorizing the seizure of literally hundreds of classes of property. There is no time limitation as to the materials to be seized; there is no language limiting the search to specific transactions on any particular dates; no offense is specifically identified in the warrant; and the scope of the warrant is not confined to any particular files or specific categories of documents. The District Court accordingly found:

> The search warrant in this case is nothing more than a broad statement particularly describing those records likely to be kept by any enterprise engaged in the oil and waste oil business. The warrant did not indicate that the documents sought pertained to any specific transactions, did not identify the offenses on which the evidence was sought, did not designate or refer to a time period for which records could be seized, and finally, did not confine the search to any particular files or categories of documents. App. 3 at 5-6.

On March 1, 1988, Kiesel filed a Motion to Quash the Search Warrant and for Other Relief pursuant to Rule 41(e), Fed. R.

Crim. P. A hearing was then conducted limited to the narrow issue of lack of specificity in the warrant and its accompanying property description. In the hearing, the Government acknowledged that the affidavit supporting issuance of the warrant (the "search affidavit") had not been served with the warrant and was not present at the scene during the search and seizure of Kiesel's property. Earlier, on the day of the search, Kiesel had been advised through its counsel that the agent in charge was determining in her own discretion which items should be seized under the warrant without use or benefit of the search affidavit.

After finding the warrant to be fatally overbroad, the district court declined to act under Rule 41(e), and instead, exercised anomalous jurisdiction to quash the warrant and order the seized items returned to Kiesel.[1] The court also enjoined use of information derived from the seized records; however, this was without prejudice to lawful reacquisition of the same materials.

The court of appeals then reversed. After ordering the search affidavit unsealed, the court held that exercise of anomalous jurisdiction requires each of three independent findings: (1) callous disregard of the Fourth Amendment; (2) irreparable injury if relief is not awarded; and (3) the lack of an adequate remedy at law. The court found that Kiesel had not satisfied these extreme standards. In addition, the court found that an "all records" search is valid under the Fourth Amendment if the Government shows a "pervasive pattern" of illegality rather than probable cause to believe that illegality permeated the entire business operation.

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[1] Anomalous jurisdiction is the power of a federal court to exercise its equitable powers and frame decrees thereunder apart from the grant of any specific authority under the Rules of Criminal Procedure.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE REQUIREMENTS FOR PRE-INDICTMENT REVIEW OF A SEARCH WARRANT.

In conflict with the Tenth Circuit, the Eighth Circuit in *Kiesel* has prescribed standards for pre-indictment review of a search warrant which create an insurmountable barrier to review. The *Kiesel* court, over a strong dissent, holds that the exercise of anomalous jurisdiction requires each of three, independent findings: (1) callous disregard of the Fourth Amendment; (2) irreparable injury if relief is not awarded; and (3) the lack of an adequate remedy at law. The court further holds that the availability of post-indictment review of a search warrant through a motion to suppress negates a claim of irreparable injury and thereby precludes pre-indictment review. Because equitable principles are to be applied whether pre-indictment review is sought pursuant to the exercise of anomalous jurisdiction or rule 41(e), Fed. R. Crim. P., jurisdiction, *In re Harper,* 835 F.2d 1273 (8th Cir. 1988), the decision effectively precludes pre-indictment review of a search warrant.

Kiesel directly conflicts with *Floyd v. United States,* 860 F.2d 999, 1003 (10th Cir. 1988). In *Floyd,* the Tenth Circuit explicitly rejected "callous disregard" as a factor in triggering pre-indictment review of a Rule 41(e) motion. More importantly, the Tenth Circuit found that irreparable harm permitting pre-indictment review was not precluded by the availability of a post-indictment motion to suppress, citing as examples *Peiper v. United States,* 604 F.2d 1131, 1134 (8th Cir. 1979) (irreparable injury if criminal indictment based on illegally seized evidence appears imminent) and *Mr. Lucky Messenger Service, Inc. v. United States,* 587 F.2d 15, 18 (7th Cir. 1978) (irreparable injury if rule 41(e) movant needs funds to satisfy tax liability). *Floyd*

thus permits review in circumstances where the blanket prohibition of *Kiesel* would preclude review. *Accord Center Art Galleries v. United States,* 875 F.2d 747 (9th Cir. 1989).

Kiesel is also in conflict with the Fifth Circuit's ruling in *Richey v. Smith,* 515 F.2d 1239, 1243 n.10 (5th Cir. 1975), which rejects the claim that the availability of a post-indictment motion to suppress precludes a finding of irreparable injury:

> [A] wrongful indictment is no laughing matter; often it works a grevious, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot of a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.

Richey, 515 F.2d at 1243 n.10 (quoting *In re Fried,* 161 F.2d 453, 458-59 (2d Cir.), *cert. dismissed,* 332 U.S. 807 (1947)). The *Richey* court thus rejected the claim of the *Kiesel* court that the availability of post-indictment review defeats a claim of irreparable injury.

Only in passing has this Court addressed the requirements for pre-indictment review of a warrant. In *G. M. Leasing Corp. v. United States,* 429 U.S. 338, 359-60 (1977), the Court suggested that irreparable injury was required for pre-indictment review of a motion to suppress seized evidence. In so stating, the Court failed to identify the other factors set forth in *Kiesel* as individually necessary and determinative of the availability of pre-indictment review. Nor did the Court provide a restrictive interpretation of the irreparable injury requirement setting up an insurmountable barrier for review because post-indictment review is always available. *Kiesel* therefore represents a sharp departure from the limited guidance the Court has previously provided on the availability of pre-indictment review of a search warrant.

These conflicts justify the grant of certiorari to review the judgment below.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE STANDARD FOR CONDUCTING AN "ALL RECORDS" SEARCH OF A BUSINESS.

The Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971). This requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant." *Stanford v. Texas,* 379 U.S. 476, 485 (1965).

A "general" or "all records" search may be valid, however, depending upon the Circuit where the search was conducted. In the Ninth Circuit, an all records search is permissible if there is probable cause to believe that an enterprise has engaged in a pervasive scheme to defraud. *United States v. Offices Known as 50 State Distributing Co.,* 708 F.2d 1371 (9th Cir. 1983), *cert. denied,* 465 U.S. 1021 (1984). In the First Circuit, the Ninth Circuit standard must be satisfied, and, in addition, the illegality must be so pervasive that the activity cannot be segregated from other legitimate activities of the organization. *United States v. Roche,* 614 F.2d 6 (1st Cir. 1980). In the Tenth Circuit, the Ninth Circuit standard was rejected and probable cause must be shown that illegality permeated the entire business operation and that the records to be searched pertain to specific criminal activity. *Voss v. Bergsgaard,* 774 F.2d 402, 406 (10th Cir. 1985).

Although the Eighth Circuit originally adopted the stricter standard of *Voss* in *Rickert v. Sweeney,* 813 F.2d 907 (8th Cir. 1987), the court has now abandoned that standard to adopt a lesser showing for an all records search than any other Circuit. Under *Kiesel,* a showing of a "pervasive pattern" of illegality in one segment of a business is sufficient to justify an all records search. Although the issue of probable cause was not litigated before the district court, the *Kiesel* court nonetheless found that the alleged pervasive pattern of illegality with respect to Kiesel's waste oil business was sufficient to authorize a search of the records of Kiesel's other businesses, including subsidiaries and affiliates (e.g., coal, bulk hauling, farming) unrelated to waste oil processing.[2] This radical departure from its earlier rulings is in conflict with the standards of the First and Tenth Circuit for an all records search.

Kiesel is also in direct conflict with *Center Art Galleries v. United States,* 875 F.2d 747 (9th Cir. 1989). There, the Ninth Circuit held that an overbroad warrant could not be justified

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[2] As set forth in the Supplemental Brief of Appellee submitted to the Eighth Circuit after the court granted Kiesel's request and the affidavit supporting the search warrant was unsealed in redacted form for Kiesel's inspection, "Kiesel" consisted of the following at the time of the search: (1) The Kiesel Company: sales and service in coal, oil, bulk and liquid hauling, and tank cleaning; (2) Paramount Hauling Company: bulk hauling in dump and truck trailers; (3) L & L Rigging, Inc: manufacture and sale of cable slings; (4) Berryfast, Inc: pneumatic tool, nail, and staple manufacturing; (5) Goodsell, Inc: import and export of pneumatic tools, air compressors, and other items; (6) Major Cornerstone Supply USA, Inc: nail and staple company; (7) Patgood, Inc: property used for coal storage; (8) Pala Oil Products, Inc: sale of private label lubricating oil products; (9) B & C Sales, Inc: sale of wire rope; (10) American Waste Reclamation Co: waste oil processing in Houston, Missouri; (11) Kiesel Marine Services, Inc: marine transport; (12) Lindy Farms, Inc: farming and cattle raising, and (13) Ridgetop Farms, Inc: farming and cattle raising.

As Judge McMillian noted in his dissent, the waste oil business constitutes less than 10 percent of Kiesel's gross income.

under the "permeated-with-fraud" doctrine where the alleged fraud pertained to only 20 percent of the company's business and there was no showing in the supporting affidavits that relevant evidence was inseparable from the company's records. In contrast, *Kiesel* permits an all records search where the alleged fraud pertains to only a small portion of the company's business and the supporting affidavits fail to demonstrate that relevant evidence is inseparable from the company's records. It also conflicts with the Tenth Circuit's decision in *United States v. Leary,* 846 F.2d 592, 605 (1988), where the "permeation of the business" test was found insufficient to permit an all records search where the illegal activity at issue was limited to discreet transactions.

This Court has recently recognized this conflict. On October 2, 1989, in *Norton v. United States,* 110 S.Ct. 261 (1989), certiorari was denied for review of a conviction where the "permeative character of the fraud" was a given in an "all records" search. *Norton v. United States,* 867 F.2d 1354, 1360 (11th Cir. 1989). In dissent, Mr. Justice White recognized the conflict between the Eleventh Circuit on the one hand and the Tenth and the Ninth Circuits on the other regarding facially overbroad warrants in "all records" searches:

> The Eleventh Circuit held that law enforcement officers reasonably relied on warrants calling for the search and seizure of "all corporate records . . . which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18 of the United States Code," and that the evidence seized pursuant to that warrant was admissible under the good faith exception to the exclusionary rule articulated in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The decision of the Eleventh Circuit conflicts with the Tenth Circuit's decision that a warrant ordering the seizure of all records "relating to the purchase, sale and illegal exportation of materials in violation of the Arms Export Control Act, 22 U.S.C. 2278, and

> the Export Administration Act of 1979, 50 U.S.C. App. 2410," was so facially overbroad that law enforcement officers could not reasonably rely on it, *United States v. Leary,* 846 F.2d 592, 594 (1988), and a similar decision of the Ninth Circuit suppressing evidence seized under a warrant seeking "documents, books, ledgers, records and objects which are evidence of violations of federal criminal law." *Center Art Galleries-Hawaii, Inc. v. United States,* 875 F.2d 747, 749 (1989). The conflict should be resolved.

Norton v. United States, 110 S.Ct. at 261. To that ferment, there should now be added the Eighth Circuit's *Kiesel* decision. As Mr. Justice White's comment to the denial of certiorari concludes in *Norton v. United States, supra,* "the conflict should be resolved."

These conflicts justify the grant of certiorari to review the judgment below.

III.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS REGARDING PRE-INDICTMENT REVIEW AND "ALL RECORDS" SEARCHES.

This Court has never addressed the doctrine of anomalous jurisdiction or directly addressed the general availability of pre-indictment review of a Governmental search. Although "[a] substantial body of precedent establishes that federal district courts have power to order the suppression or return of unlawfully seized property even though no indictment has been returned," *Hunsucker v. Phinney,* 497 F.2d 29, 32 (5th Cir. 1974), *cert. denied,* 420 U.S. 927 (1975), the law is unsettled, the Circuits are in conflict and this Court has yet to endorse or reject the availability of anomalous jurisdiction and the equitable foundations for such relief. The *Kiesel* decision provides an appropriate opportunity for the Court to determine the availabili-

ty of pre-indictment review and, by so doing, reconcile the disparate views of the courts of appeals as to when such review is to be available.

If left unreviewed, *Kiesel* will serve to foreclose pre-indictment review of search warrants. Under *Kiesel,* the possibility of post-indictment review, which is always available, will mean that a motion to suppress or for return of seized property cannot be entertained until and unless an indictment has been brought or the Government determines that no criminal action will be initiated. Such review will accordingly occur long after the search was conducted thereby defeating the right codified in Rule 41(e) for return of property once it has been illegally seized by the Government.

Further, this Court has never addressed the propriety of the "permeation of the enterprise" doctrine for an all records search, an issue upon which the courts of appeal have split over the relevant standards to justify an all records search. *Kiesel is in direct conflict with the Ninth Circuit's recent decision of Center Art Galleries.* Without guidance from this Court, different standards will govern the same Government conduct depending solely upon location of the search. This Court has not addressed this issue, and the facts of *Kiesel,* with its differing business interests, including subsidiaries and affiliates, untainted by the waste oil business, provide an appropriate vehicle to prescribe the standard for evaluating an all records search, assuming that an all records search is ever proper in the first instance.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals For the Eighth Circuit, *In the Matter of the Search of 4801 Fyler Avenue, etc., The Kiesel Company, Inc., Appellee v. Kimberly Householder, Special Agent, Federal Bureau of Investigation, et al., Appellants,* No. 88-1573, submitted September 20, 1988 and filed July 13, 1989.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1573

In the Matter of the Search of 4801 Fyler Avenue, etc.
The Kiesel Company, Inc.,
Appellee,

v.

Kimberly Householder, Special Agent,
Federal Bureau of Investigation, et al.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 20, 1988

Filed: July 13, 1989

Before McMILLIAN, JOHN R. GIBSON and MAGILL,
Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The United States appeals from a district court order requiring the return of property seized during execution of a search warrant against the Kiesel Company. The warrant, issued by another district judge, was ruled constitutionally overbroad because it described virtually all property on the Kiesel premises, both business and personal. Although Kiesel had sought relief under Federal Rule of Criminal Procedure 41(e), the district court instead asserted "anomalous" jurisdiction and proceeded in equity. As a result the district court did not permanently suppress the evidence, but instead required only that the government return the evidence to Kiesel and not use it at trial unless a proper warrant had been used to again seize the property. We reverse the order of the district court.

I.

The United States, following an extensive investigation by Federal Bureau of Investigation agent Kimberly Householder into possible violations by Kiesel of federal environmental law,[1] applied to a federal district judge for a warrant to search the Kiesel business premises at 4801 Fyler Avenue, St. Louis. Agent Householder presented a lengthy affidavit to support the ap-

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[1] The investigation particularly focused on criminal violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d), the Clean Water Act, 33 U.S.C. §§ 1311, 1319(c)(1) & (2), the Rivers and Harbors Act, 33 U.S.C. §§ 407, 411, and the Toxic Substances Control Act, 15 U.S.C. §§ 2614, 2615(b). Violators of any of these sections are subject to fines and imprisonment, with varying degrees of severity. RCRA violations are felonies.

plication, and the warrant was issued. It is not disputed that the scope of the warrant was extremely broad.[2]

The district court declined to order the government to return the property under Rule 41(e), looking to *Rickert v. Sweeney,* 813 F.2d 907 (8th Cir. 1987) to support its view, as Rule 41(e) would require suppression of the property even where there had not been an indictment or other proceeding instituted. It chose to consider the matter as one in equity subject to the court's anomalous jurisdiction, "following the apparent route of *Rickert.*" It did not, however, determine if traditional equitable requirements were met, but simply proceeded to the merits. Evaluating the warrant, the district court conceded that the suspected criminal activity was of such a complexity that

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[2] The district court set forth in its order three paragraphs that it found to be representative:

> 3. Any correspondence, records, files, work orders, logs, or other documents, including computer storage media, relating to receipt, storage, blending, transfer or disposal of hazardous wastes and hazardous waste constituents, oil, waste oil, hazardous waste, fuel, and PCBs.
>
> * * * .
>
> 12. Kiesel Oil's Articles of Incorporation, corporate by-laws, and Board of Director's meeting minutes, or any other documents demonstrating the existence of any other company or joint venture in which Larry Gooden, Lorraine "Pat" Kiesel or other Kiesel Oil employees are or were participants or partners, or in which any of these individuals have an ownership interest, which companies or joint ventures are involved in the handling of oil, waste oil, hazardous waste fuel, hazardous waste or PCBs.
>
> 13. Any correspondence, files, records, checking or savings accounts, financial records, or other documents, including computer storage media, relating to the companies referenced in paragraph [12].

Kiesel Co. v. Householder, No. 88 Misc. 75, slip op. at 4 (E.D. Mo. Apr. 7, 1988).

some latitude was allowable in the descriptions of the property to be seized.[3] Finding the warrant to authorize an all encompassing search, the court declared it unconstitutionally overbroad. It ordered the FBI to return to Kiesel all property taken under the authority of the warrant and enjoined the use of that property and information derived from it in any criminal investigations, but specified that the order was without prejudice. The government could thus once again seize and use any of Kiesel's property if it obtained a narrower warrant.

The government appeals. It argues that the warrant was not overbroad because probable cause to suspect a substantial pattern of illegality has been established, and the principles of *United States v. Kail,* 804 F.2d 441 (8th Cir. 1986), therefore apply. It points out that due deference should be accorded the ruling of the first district judge who issued the warrant. It also claims that the district court was wrong to exercise equitable jurisdiction without considering the factors set forth in *Pieper v. United States,* 604 F.2d 1131 (8th Cir. 1979). Finally it argues that the officers executing the warrant acted in good faith, and that *United States v. Leon,* 468 U.S. 897 (1984), therefore requires dismissal. We have ordered the FBI's affidavit to be unsealed, and both parties have been given the opportunity to submit additional comments based upon its contents.

II.

We begin by discussing the district court's procedural approach to this case. It properly considered Kiesel's claim as an equitable proceeding rather than a Rule 41(a) motion. "[A] motion prior to any suggestion of criminal proceedings, as here, is more properly considered as a suit in equity rather than one

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[3] The court specifically declined to unseal the affidavit and conduct a hearing, as in *Rickert,* but its order discussing the scope of the warrant makes specific reference to the affidavit.

under the Rules of Criminal Procedure." *Richey v. Smith,* 515 F.2d 1239, 1245 (5th Cir. 1975). Having decided this, however, the district court failed to evaluate whether the circumstances of the case warranted the exercise of equitable jurisdiction. Our decision in *Pieper,* 604 F.2d at 1133, holds that such jurisdiction is proper only upon a showing of callous disregard of the fourth amendment, irreparable injury if relief is not granted, and lack of an adequate remedy at law. *See also Richey,* 515 F.2d at 1243-44; *Hunsucker v. Phinney,* 497 F.2d 29, 34-35 (5th Cir. 1974), *cert. denied,* 420 U.S. 927 (1975). *Pieper,* as well as its supporting authority, found such a showing necessary to establish "anamolous jurisdiction" so as to give it authority to proceed. In contrast, after indictment exercise of the court's jurisdiction is specifically authorized by Rule 41(e) of the Federal Rules of Criminal Procedure.

The district court, however, made no such analysis and considered none of these factors, instead asserting that the only issue to be decided was the specificity of the search warrant itself. It relied on *Rickert v. Sweeney,* 813 F.2d 907 (8th Cir. 1987), and *In re Grand Jury Proceedings,* 716 F.2d 493 (8th Cir. 1983), evidently believing that these cases obviated the need to consider the three *Pieper* factors. We do not read *Rickert* and *Grand Jury Proceedings* so broadly. Neither contains an explicit discussion of application of the three *Pieper* factors, but the opinions do not reveal that this issue was raised by the parties or considered by either the district court or this court in those cases. Our recent decision of *In re Harper,* 835 F.2d 1273, 1275 (8th Cir. 1988), makes clear that the *Pieper* factors must still be met before equitable jurisdiction may be exercised.

III.

Thus, we must determine whether the district court abused its discretion by reaching the merits of Kiesel's claim. *See Harper,* 835 F.2d at 1275. This is made difficult, of course, by the district court's failure to analyze the equitable considerations

underlying the facts of the case. We are satisfied, however, that the district court's acceptance of jurisdiction need not be given deference in view of its failure to apply the proper *Pieper* analysis underlying this bare conclusion. Still, on the basis of the record before us, we have no hesitation in concluding that Kiesel is unable to adequately demonstrate that the *Pieper* factors have been met.

Most significantly, Kiesel is unable to show that the government acted in callous disregard of its fourth amendment rights. The federal agents searching Kiesel's premises first obtained a warrant from a United States District Judge using a lengthy and detailed affidavit describing a broad range of illegal activity to establish probable cause. Thus, the officers acted in objective good faith, rather than with callous disregard for Kiesel's right. *Cf. United States v. Leon,* 468 U.S. 897, 923-25 (1984). "When judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable." *United States v. Martin,* 833 F.2d 752, 756 (8th Cir. 1987). In view of the agents' efforts to comply with the warrant requirement, and the first district judge's approval of the search, we cannot say that Kiesel's rights were callously disregarded, nor, in light of the unsealed affidavit available to us, do we conclude that there was callous disregard in the methods utilized in the search. The affidavit described numerous occasions of mixing waste oil contaminated with PCB with pure oil for resale and indicated that there was a wide pattern of such conduct. Examination of Kiesel's records over the period of time in question was justified by the affidavits. The affidavits also contained charges that not only had tanks containing contaminated oil leaked on the premises, but that sludge from cleanup activities was buried on the premises.

Further, we find neither of Kiesel's two allegations of irreparable injury persuasive. First, it claims that its ability to conduct business has been unduly hampered by the search, due to the actual seizure of needed documents. Although the record is sparse on this point, it does seem that the government has

made provisions to allow Kiesel reasonable access to the seized documents. In any event, the burden is on Kiesel to prove interference with business operations, and it has not done so. Simple unsupported allegations of business disruption or speculations as to future harm are not sufficient to establish irreparable injury.

Second, Kiesel claims harm from the potential stigma of being improperly indicted on the basis of illegally seized evidence, thereby facing a criminal prosecution that might have been avoided. This is a more persuasive argument. As the Fifth Circuit has stated:

> [A] wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.

Richey, 515 F.2d at 1243 n.10 (quoting *In re Fried,* 161 F.2d 453, 458-59 (2d Cir.), *cert. dismissed,* 332 U.S. 807 (1947)). Thus, it is completely plausible for Kiesel to claim that if the seized evidence results in an indictment that would not otherwise have issued, real harm will occur. Former business contacts may evaporate, future business may suffer, and a general taint may attach to Kiesel's owners and employees.

As real as this potential harm may be, however, we are not convinced that it is irreparable injury that warrants bypassing the normal procedures for challenging the constitutionality of searches by resorting to equitable remedies. These remedies are extraordinary, and they must be used with restraint. *See Harper,* 835 F.2d at 1274; *Pieper,* 604 F.2d at 1133; *United States v. Rapp,* 539 F.2d 1156, 1160-61 (8th Cir. 1976); *See also Meier v. Keller,* 521 F.2d 548, 554 (9th Cir. 1975), *cert. denied,*

424 U.S. 943 (1976); *Hunsucker,* 497 F.2d at 34. As the government correctly points out, however, if we were to allow the mere threat of future prosecution to constitute irreparable harm these procedures would not be extraordinary, but quite ordinary. Every potential defendant could point to the same harm, thereby invoking the equitable powers of the court. This has not been the practice of the past, and we see no reason to alter that course now. We therefore must conclude that the possible stigmatization of defending oneself in a criminal trial is an insufficient harm to justify the district court's use of its equitable powers.

Finally, as the government points out, should criminal proceedings be instituted, Kiesel will have an adequate remedy to challenge the search, namely a motion to suppress any evidence that has been improperly seized. Since none of the three *Pieper* factors have been met, the district court abused its discretion by exercising equitable jurisdiction. Kiesel should have been required to wait and litigate these issues during a criminal proceeding, most likely at a pretrial suppression hearing, the normal forum for such cases.

IV.

Although we have disposed of the case on procedural grounds, we still feel compelled to comment on the district court's approach to the merits. The district court failed to give any deference whatsoever to the initial determination of probable cause, which was made by another district judge of the same district. *Illinois v. Gates,* 462 U.S. 213 (1983), makes clear that courts reviewing probable cause determinations do not do so *de novo.* "A magistrate's determination of probable cause should be paid great deference by reviewing courts. A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to warrant * * * ." *Id.* at 236 (citations omitted). The reasonableness of the search here is a close

question, and the initial determination should have been weighed into the balance.

Were we to reach this issue, we are satisfied that, after according proper deference to the determination by the first district judge, having had the opportunity to consider the unsealed affidavit, and after inviting supplemental briefing by both parties on this document, we would determine that the district court erred in ruling the search warrant constitutionally overbroad. The affidavit described a pervasive pattern, extending over a period of time, of the mixture of used contaminated oil with fresh oil, and either accidental or intentional contamination of the premises wich such oil. We would conclude that the warrant and search were fully supported by our earlier decision in *United States v. Kail,* 804 F.2d 441 (1986). In our view, the affidavits describe circumstances permeating the entire business operation, as in *Kail,* so as to support a determination of probable cause that the operation was permeated with illegal conduct occurring over a period of several years. The records dealing with Kiesel's used oil and hazardous waste operations, which was the limitation placed on the warrant, were properly seized.

We mention only two related procedural inconsistencies in the district court's opinion. although it relied strongly on *Rickert,* it refused to follow the *Rickert* example of unsealing the affidavit. Additionally, there was a factual dispute as to whether the affidavit was present at the time of the search or not, but the district court did not make a factual finding on this issue. In view of the development of the case, these issues are now irrelevant, but following *Rickert* consistently and determining whether the warrant was present at the search might have channeled this case into a substantially different pattern than that presented to us.

V.

To summarize, we believe that the issues of this case were decided prematurely. Since Kiesel could not justify the exercise of equitable jurisdiction, it must wait until an indictment is brought, and challenge the search in a suppression hearing. The judgment of the district court is reversed, and the case is remanded with instructions to dismiss.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. I would affirm the judgment of the district court both in the application of its equitable jurisdiction and in the quashing of the overbroad, facially defective search warrant.

The majority cites *Pieper v. United States,* 604 F.2d 1131 (8th Cir. 1979) (*Pieper*) for the proposition that a court is required to make three findings of fact[1] before it exercises its equitable jurisdiction[2] to determine the legality of a search warrant. I do

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[1] *See* slip op. at 4:

> Our decision in *Pieper* . . . holds that such jurisdiction is proper only upon a showing of callous disregard of the fourth amendment, irreparable injury if relief is not granted, and lack of an adequate remedy at law.

[2] Such jurisdiction is referred to as a court's "anomalous jurisdiction" by the Fifth Circuit. *See Richey v. Smith,* 515 F.2d 1239, 1243 (5th Cir. 1975) (*Richey*).

not so read *Pieper* or its supporting authority. *See also Richey v. Smith,* 515 F.2d 1239 (5th Cir. 1975) (*Richey*).[3]

The issue on appeal in *Pieper* was whether a district court had abused its discretion by refusing to exercise its equitable jurisdiction to quash a search warrant. This court noted that the district court had considered the three *Richey* factors, and that "they are *appropriate* considerations for the District Court." 604 F.2d at 1133 (emphasis added). *Pieper* does not hold that an explicit finding of fact on each of these factors is mandatory before a court may exercise its equitable jurisdiction to quash an illegal search warrant.

In the instant case the district court implicitly considered the three factors when it stated that it was "following the apparent route of *Rickert* and the stated reasoning of *Richey v. Smith.*" *The Kiesel Co. v. Householder,* No. 88 Misc. 075, slip op. at 8 (E.D. Mo. Apr. 7, 1988).

Even if an explicit finding of fact on each of the *Richey-Pieper* factors were mandatory before a district court could exercise its equitable jurisdiction, the proper disposition of this case would be to remand it to the district court with directions

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[3] *Richey* indicates that the list of factors that the majority in the instant case seeks to make mandatory is neither mandatory nor exhaustive:

> In *Hunsucker* [*Hunsucker v. Phinney,* 497 F.2d 29 (1974) *cert. denied,* 420 U.S. 927 (1975)], we listed *some* of the considerations that should govern the decision of the district court whether to exercise this "anomalous" jurisdiction. First . . . whether . . . government agents . . . displayed "a callous disregard for the constitutional rights of the [plaintiff]." Other factors to be considered are: whether the plaintiff has an individual interest in and need for the material whose return he seeks; whether the plaintiff would be irreparably injured by denial of the property; and whether the plaintiff has an adequate remedy at law for the redress of his grievance.

Id. 1243-44 (emphasis added; citation omitted)

to make the findings of fact. *See Richey,* 515 F.2d at 1244. Instead, the majority improperly makes the findings of fact for the district court, *see* slip op. at 5-8, unnecessarily indulging in judicial activism.

Accordingly, I would hold that the district court did not abuse its discretion in exercising its equitable jurisdiction.

In dicta, the majority concludes that, were it to reach the merits it would reverse the decision of the district court because the search warrant in question is not unconstitutionally over broad. I disagree. I would hold that the district court correctly found that the search warrant was both overly broad and improperly executed.

A search warrant must limit the items to be seized so that "nothing is left to the discretion of the officer executing the search." *Andresen v. Maryland,* 427 U.S. 463, 480 (1976). In the instant case the affidavit supplying the probable cause for the search warrant was not even at the scene of the search. Nor was there any document indicating what crime or crimes the Kiesel Company was suspected of committing. Therefore, nothing limited the discretion of the officers conducting the search even though this court has held that "some measure must be taken not only to limit the discretion of the executing officer but also to inform the subjected person what the officers are entitled to take." *Rickert v. Sweeney,* 813 F.2d 907, 909 (8th Cir. 1987). Because the search warrant in the instant case did not limit the discretion of the officers, they did indeed search and seize the records of many of the Kiesel Company's subsidiaries and controlled corporations which have nothing to do with waste oil production and sale.

A search warrant so broad that it allows seizure of all or almost all of the business papers of an entity is constitutionally permissible only if the government can show "probable cause to believe that fraud permeated the entire business operation." *United States v. Kail,* 804 F.2d 441, 445 (8th Cir. 1987) (*Kail*).

Even with the support of the affidavit, the government cannot make such a showing. The Kiesel company consists of such diverse subsidiaries and controlled corporations as Berryfast, Inc., a California corporation manufacturing pneumatic tools, nails and staples, and Ridgetop Farms, Inc., an Illinois farming and cattle raising corporation. Waste oil production and sales account for less than ten percent of the Kiesel Company's gross income. Yet all of the allegedly illegal activities cited in the affidavit (which was only made available to Kiesel Company in redacted form months after the search) involve waste oil production and sales and related activities. No fraud is alleged in pneumatic tool manufacturing or farming activities, or any of the other widespread enterprises of the Kiesel Company. For that reason, *Kail* does not control this case as the majority suggests. Furthermore, unsealing the affidavit would have been of little use to the district court in trying to save this facially overbroad warrant.

For these reasons, I would affirm the judgment of the district court.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

Order of the United States District Court, Eastern District of Missouri, Eastern Division, *In the Matter of the Search of 4801 Fyler Avenue, etc., The Kiesel Company, Inc., Petitioner v. Kimberly Householder, special Agent, Federal Bureau of Investigation, et al., Respondent,* Civil Action No. 88-MISC-075, entered April 7, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88 MISC 075

In the Matter of the Search of 4801 Fyler Avenue, etc.
The Kiesel Company, Inc.,
Petitioner,

v.

Kimberly Householder, Special Agent,
Federal Bureau of Investigation, et al.,
Respondent.

ORDER

In accordance with the Memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED that the restated motion of the Kiesel Company to quash search warrant and for other relief is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that the search warrant in the Matter of the Search of 4801 Fyler, St. Louis, Missouri, is QUASHED.

IT IS FURTHER ORDERED that the government agents return to the Kiesel Company all real and personal property seized from the premises pursuant to the search warrant.

IT IS FURTHER ORDERED that the return of property be STAYED through April 12, 1988, to give the parties time to exercise their right of appeal.

IT IS FURTHER ORDERED that the government and its agents are enjoined, subject to the limitations set out in the memorandum incorporated herein, from using in any proceeding information derived from the records or property while in the possession of the government agents pursuant to seizure under this search warrant.

IT IS FURTHER ORDERED that the motion is DENIED in all other respects.

Dated this 7th day of April, 1988.

/s/ Edward H. Filippine
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88 MISC 075

In the Matter of the Search of 4801 Fyler Avenue, etc.
The Kiesel Company, Inc.,
Petitioner,

v.

Kimberly Householder, Special Agent,
Federal Bureau of Investigation, et al.,
Respondent.

MEMORANDUM

This matter is before the Court on the motion of petitioner, The Kiesel Company, Inc. (hereinafter Kiesel), to quash search warrant and for other relief. The government has filed a response in opposition to the motion to which Kiesel has replied.

This action is brought by Kiesel in response to the execution of a search warrant by the Federal Bureau of Investigation (hereinafter FBI) and two agents of the Environmental Protection Agency (hereinafter EPA). Beginning on February 29, 1988, at 12:30 p.m., agents of the FBI and EPA seized the premises of Kiesel at 4801 Fyler, St. Louis, Missouri, interviewed employees of Kiesel, screened all telephone calls in and out of the premises, searched the premises and facilities, and seized a number of items, real and personal property of Kiesel, pursuant to the search warrant. Petitioner moves the Court, pursuant to Federal Rule of Criminal Procedure 41(e), to quash the search warrant and order suppression and return of all property seized, and further, to unseal the affidavit in support of the search warrant, enjoin any investigatory activities based upon the search warrant, quash or suspend any grand jury investigations until

the validity of the search and seizure is determined, and for such other relief as the Court deems just and proper under the circumstances.

In support of its motion, Kiesel asserts that the search warrant authorized an unconstitutional general exploratory search of its entire premises in violation of the Fourth Amendment of the Constitution of the United States. Petitioner asserts in its motion that the search warrant was "excessive, overbroad, and unreasonable" in the following respects:

> It authorized two agencies of the United States to seize *all* business and personal records for an unlimited period of time; the scope of the search was unlimited; the face of the warrant did not state that any documents or other items sought therein was evidence of any specific criminal violation; the face of the warrant did not establish any probable cause in terms of any evidence to be seized; and the face of the warrant did not confine the search to particular items, documents, or materials alleged to be evidence of any specific crime.

The affidavit filed in support of the search warrant is under seal so Kiesel has not had an opportunity to examine its contents. Kiesel further argues that even if valid, the search warrant was improperly executed in that areas outside its scope were searched and property outside its scope was seized. The government raises a number of issues in its response to Kiesel's motion, including its argument for dismissal under the holding in *Pieper v. United States,* 604 F.2d 1131 (8th Cir. 1979). As to the latter, in view of the more recent Eighth Circuit cases of *Rickert v. Sweeney,* 813 F.2d 907 (8th Cir. 1987), and *In re Grand Jury Proceedings,* 716 F.2d 493 (8th Cir. 1983), the Court finds this argument unpersuasive and further finds the issue of the specificity of the search warrant to be dispositive of this matter.

"The fourth amendment prohibits general searches and requires that a search warrant describe with particularity the items

to be seized." *Rickert v. Sweeney,* 813 F.2d 907, 909 (8th Cir. 1987); *Andresen v. Maryland,* 427 U.S. 463, 480 (1976). Where probable cause exists to believe the suspected wrongdoing is complex and invades the entire business enterprise, broad language in a search warrant may be appropriate. *Rickert,* 813 F.2d at 909; *United States v. Bentley,* 825 F.2d 1104, 1110 (7th Cir. 1987) ("seize every business paper" may be sufficiently particular language); *United States v. Kail,* 804 F.2d 441, 444-45 (8th Cir. 1986). The description in the search warrant of the place to be searched and items to be seized, however, "must be as particular as the circumstances reasonably permit." *Bentley,* 825 F.2d at 1110; *Rickert,* 813 F.2d at 909 (8th Cir. 1987) (probable cause existed to search for tax evasion in connection with one particular project); *Voss v. Bergsgaard,* 774 F.2d 402, 406 (10th Cir. 1985) (bulk of warrant not restricted to evidence relating to tax fraud); *United States v. Roche,* 614 F.2d 6, 7 (1st Cir. 1980); (warrant could have been limited to documents relating to automobile insurance).

The description of the items to be seized in the search of Kiesel's premises is set out in a four page property list attached to the search warrant and incorporated therein by reference. Rather than set out the entire property list herein, the Court will set out three paragraphs of the property list which are representative of the items sought throughout:

> 3. Any correspondence, records, files, work orders, logs, or other documents, including computer storage media, relating to receipt, storage, blending, transfer or disposal of hazardous wastes and hazardous waste constituents, oil, waste oil, hazardous waste, fuel, and PCBs.
>
> . . . .
>
> 12. Kiesel Oil's Articles of Incorporation, corporate by-laws, and Board of Director's meeting minutes, or any other documents demonstrating the existence of any other company or joint venture in which Larry Gooden, Lor-

raine "Pat" Kiesel or other Kiesel Oil employees are or were participants or partners, or in which any of these individuals have an ownership interest, which companies or joint ventures are involved in the handling of oil, waste oil, hazardous waste fuel, hazardous waste or PCBs.

13. Any correspondence, files, records, checking or savings accounts, financial records, or other documents, including computer storage media, relating to the companies referenced in paragraph [12].

The government argues that although the government established in the affidavit that the entire enterprise was engaged in pervasive criminality, it chose to seize only particularly described classes of records. Furthermore, the government asserts that although no specific dates or similar limitations were placed on the records to be seized, it is error to assume "that law enforcement agents would willingly seize outdated records which were of no value to their investigation." (Government's Response to Restated Motion, at 20).

In this case, the government was not searching for one tangible item that could be particularly described with ease; but, rather, the suspected wrongdoing as set out in the sealed affidavit is of some complexity warranting some latitude in the breadth of the description in the search warrant. Even if the affidavit is assumed to provide probable cause that property that constitutes evidence of the commission of a criminal offense would be obtained in a search of Kiesel, the affidavit does not provide probable cause to justify the search warrant authorizing a search of *all* Kiesel's records for *all* time. The Court's review of the returns submitted by the government's agents of the items seized in the search support this conclusion. To assume that the agents executing the warrant will limit the seizure of records to those which are of value to the investigation is to ignore the Supreme Court's directive that the search warrant is to be drawn to ensure "nothing is left to the discretion of the officer ex-

ecuting the warrant." *Andersen v. Maryland,* 427 U.S. 463, 497 (1976); *Stanford v. Texas,* 379 U.S. 476, 485 (1965); *Marron v. United States,* 275 U.S. 192, 196 (1927).

The search warrant in this case is nothing more than a broad statement particularly describing those records likely to be kept by any enterprise engaged in the oil and waste oil business. The warrant did not indicate that the documents sought pertained to any specific transactions, did not identify the offenses on which evidence was sought, did not designate or refer to a time period for which records could be seized, and finally, did not confine the search to any particular files or categories of documents. *See In re Grand Jury Proceedings,* 716 F.2d 493, 497-98 (8th Cir. 1983). The Court holds that the search warrant on its face failed to particularly describe the records to be searched and seized and thus authorized a general search in violation of the fourth amendment.

In *Rickert v. Sweeney,* the Eighth Circuit addressed a similar case in which the search warrant was found to be lacking in particularity. The search warrant had been supported by a sealed affidavit providing probable cause for the search which was not available to the party owning the premises being searched and which was not incorporated into the warrant nor brought to the scene of the search. The court found that the affidavit revealed that probable cause existed to search the records of one particular project. The *Rickert* court recognized that had the affidavit been incorporated into the search warrant or attached to the warrant, or even brought to the scene of the search to limit the discretion of the agents, sufficient particularity would have been provided. The court further noted that Rickert and his companies were never informed as to what the agents were entitled to take, and that the items taken exceeded the scope of probable cause. *Rickert,* 813 F.2d at 909. Nevertheless, the court held that if the district court on remand would unseal the affidavit, the warrant's lack of particularity could be cured and a hearing held in which the district court would determine which

items seized were within the scope of the affidavit's probable cause and the items seized outside the scope of probable cause would be ordered returned.

Upon remand, the district court unsealed the affidavit and a hearing was held in which the government had the burden of proof to show that the items seized in the search were within the scope of probable cause established by the affidavit. *Rickert v. Sweeney,* 86 MISC 182 (Mar. 17, 1987 and April 3, 1987).

In this case as in *Rickert,* the search warrant on its face is unconstitutionally overbroad; the affidavit providing probable cause for the warrant is under seal; the affidavit was not incorporated into nor attached to the search warrant; although there is some dispute as to whether the affidavit was available at the scene of the search, the initial representations by the parties were that it was not available on the premises to limit the discretion of the agents conducting the search; Kiesel was not informed as to what items were authorized by the warrant to be searched and seized; and finally, the items seized exceeded the scope of the affidavit's probable cause. Virtually all business and personal records maintained by Kiesel on the searched premises were seized. Although the sealed affidavit provides probable cause to warrant a search of Kiesel's premises for property constituting evidence of criminal activity, unlike *Rickert,* the affidavit does not provide particularized information going to a specific project or projects and therefore could not be used to limit the scope of the warrant. The affidavit would not afford much assistance to the Court in attempting to distinguish, by dates or specific transactions, those items seized in the search that would fall within the scope of probable cause from those items that would fall without.

The Court thus finds that to unseal the affidavit and hold a hearing as was done in *Rickert* would be inappropriate in this case. Nevertheless, it is clear from the Eighth Circuit's holding in *Rickert,* that the court was unwilling to order a return of pro-

perty under Federal Rule of Criminal Procedure 41(e), which provides that property ordered returned shall also be suppressed, especially at a time when there was no indictment or other proceeding initiated by the government against Rickert. Thus, although Kiesel's motion is pursuant to Rule 41(e), the Court will decline to exercise its jurisdiction under the Federal Rules of Criminal Procedure, and will instead consider the matter as one in equity and subject to the Court's anomalous jurisdiction following the apparent route of *Rickert,* and the stated reasoning of the Fifth Circuit in *Richey v. Smith,* 515 F.2d 1239 (5th Cir. 1975) relying upon the approach of Judge Wyzanski in *Lord v. Kelley,* 223 F.Supp. 684 (D.Mass. 1963). In *Lord,* the court ordered a return of the seized records but refused to order their suppression from future proceedings noting that the Internal Revenue Service (hereinafter IRS) agents knew of the existence of the records prior to their seizure and could have obtained the records by a signed summons had they waited until the date of summons, reasoning that by the remedy of returning the taxpayers' property, the complainant would "be as well off as, but not better off than, before the unlawful seizures." *Lord,* 223 F.Supp. at 691.

In this case it is evident from the sealed affidavit that the government's agent knew of the existence of items and records prior to their seizure. Unfortunately, the search warrant and resulting seizure was not limited to a search for those items and records, but rather constituted a general search and an all-encompassing seizure. Thus, pursuant to the equitable powers of the Court, the Court will order that all items seized pursuant to the search warrant be returned to Kiesel, without prejudice, but the Court will enjoin any federal agent from using in any proceeding information derived from the records or property while in the possession of the government agents pursuant to seizure under this search warrant. *See Lord,* 223 F.Supp. at 689, 691. As in *Lord,* however, the injunction shall not "preclude the United States or its agents from requiring, by appropriate warrant, subpoena, summons, or other due process of

law," Kiesel to produce any record or item covered by the affidavit before the unlawful seizure. *Lord,* 223 F.Supp. at 691; *see Segura v. United States,* 468 U.S. 796 (1984) (independent source of information on which warrant was secured). All other relief requested by petitioners shall be denied.

In quashing the search warrant, the Court will stay the return of property to allow the parties time to exercise their right of appeal.

Dated this 7th day of April, 1988.

/s/ Edward H. Filippine
United States District Judge

APPENDIX C

Search Warrant of the United States District Court, Eastern District of Missouri, Eastern Division, issued February 26, 1988 on the premises of 4801 Fyler Avenue, St. Louis, Missouri.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

SEARCH WARRANT

Case Number: 88 MISC 075

In the Matter of the Search of

(Name, address or brief description of person or property to be searched)

See Attachment #1 (Fylēr)

TO: Special Agent Kimberly Householder and any Authorized Officer of the United States

Affidavit(s) having been made before me by Special Agent Kimberly Householder who has reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

See Attachment #1 (Fyler) incorporated herein by reference

In the Eastern District of Missouri, there is now concealed a certain person or property, namely (describe the person or property)

See attachment #2 (Property List), incorporated herein by reference

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOUR ARE HEREBY COMMANDED to search on or before March 8, 1988

Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to Stephen N. Limbaugh, U.S. District Judge, as required by law.

February 26, 1988 at St. Louis, Missouri
Date and Time issued City and State

Stephen N. Limbaugh, U.S. District Judge
Name and Title of Judicial Officer

/s/ Stephen N. Limbaugh
Signature of Judicial Officer

ATTACHMENT #1
Premises List

a. **4801 Fyler, St. Louis, Missouri**

This site is more particularly described as real estate, containers, and attached structures on the north side of Fyler, along the most easterly part of the 4800 block, east of the intersection of Fyler and Kingshighway, and which has the address of 4801 Fyler. The property is immediately to the east of a used car lot and is bounded by a wire fence on all sides, with a railroad track bounding its northern and eastern sides. Two large warehouse-style buildings are located at 4801 Fyler, with the main office being located in the western portion of the easternmost of the two large warehouse-style buildings. On this building, a small enclosed porch, with five cement steps attached, forms the entrance where "The Kiesel Co." appears in white block letters on the brick front. A large parking, storage, shipping and delivery area surrounds these buildings and numerous tanks and drums are on the property. There are two entrances through the surrounding fence, which are on the south side of the property, along Fyler, which dead-ends at the railroad track running directly east of the property. Photographs of the property are attached as exhibits 1, 2 & 3.

ATTACHMENT #2

Property List

1. Hazardous waste and hazardous waste constituents, oil, waste oil, hazardous waste fuel and polychlorinated biphenyls (hereinafter "PCBs"); sludges, wastes and residues generated by the receipt, storage, blending and transfer of oil, waste oil, and hazardous waste fuel, PCBs, and contents of vacuum trucks, tank trucks and barges; tanks, drums, barrels, containment or impoundment areas/devices, drains, tunnels, hoses and sewer lines, spigots, faucets and valves in which or through which hazardous wastes, hazardous waste constituents, oil,

waste oil, hazardous waste fuel and PCBs or residue thereof, are concealed or have passed; samples of earth, soil, gravel, pavement or other surface coverings, of subsurface soil or material, of leachate and of contiguous navigable waters and waterbed.

2. All books and records (of all sorts, including computer disks or printouts) indicating the names, addresses, and telephone numbers, of all company employees, and all documents which contain job descriptions or other material defining the nature and scope of each employee's responsibility at The Kiesel Company (and its subsidiary or controlled corporate entities, as more fully described in paragraph 3 of the affidavit in support of this search warrant, said description being hereby incorporated by reference, and which entities are hereafter jointly referred to as Kiesel Oil), and records which show time and attendance of said employees, including time cards, or other such records reflecting employment history, such records to include those of former employees no longer currently employed by the company.

3. Any correspondence, records, files, work orders, logs, or other documents, including computer storage media, relating to receipt, storage, blending, transfer or disposal of hazardous wastes and hazardous waste constituents, oil, waste oil, hazardous waste, fuel, and PCBs.

4. Documents demonstrating or pertaining to purchases of raw and waste material by Kiesel Oil for distribution.

5. Any correspondence (inter and intra office) of Kiesel Oil and between Kiesel Oil and its employees and other companies and persons, memoranda, records, files or other documents (including computer storage media) regarding contracts with Kiesel Oil customers for the handling of hazardous wastes or materials, oil, waste oil, hazardous waste fuel or PCBs.

6. Any correspondence, notes, or memoranda between officials and employees of Kiesel Oil, and federal, state, and local

environmental agencies (or other public safety agencies) which in any way relate to the company's oil or waste oil handling or brokering activities or to hazardous wastes.

7. Any documents relating to instructions given to Kiesel Oil employees or personnel regarding the handling or disposal of oil, waste oil, or wastes from the oil or waste oil business, including safety-related information.

8. Any documents showing knowledge by Kiesel Oil its executives or employees of federal or state hazardous waste permit and regulatory requirements, or hazardous waste fuel regulatory requirements.

9. Any diagrams or blueprints pertaining to the premises described herein.

10. Any manifests, bills of lading, shipping papers, invoices or other documents showing pick up, transportation, or delivery of any oil, waste oil, hazardous waste fuel, hazardous waste, hazardous waste constituents, or PCBs, or pertaining to analyses of any of said substances.

11. Documents relating to any vehicles registered to, owned, or leased by Kiesel Oil and used in the business of Kiesel Oil.

12. Kiesel Oil's Articles of Incorporation, corporate by-laws, and Board of Director's meeting minutes, or any other documents demonstrating the existence of any other company or joint venture in which Larry Gooden, Lorraine "Pat" Kiesel or other Kiesel Oil employees are or were participants or partners, or in which any of these individuals have an ownership interest, which companies or joint ventures are involved in the handling of oil, waste oil, hazardous waste fuel, hazardous waste or PCBs.

13. Any correspondence, files, records, checking or savings accounts, financial records, or other documents, including computer storage media, relating to the companies referenced in paragraph 13.

14. Documents relating to personal checking accounts, savings accounts, or other financial documents relating to Larry Gooden and Lorraine "Pat" Kiesel, which documents will reflect salaries received, payments made from or to either or both on account of the operation of Kiesel Oil, its subsidiary or controlled companies.

15. Any records of telephone conversations made by employees of Kiesel Oil, as well as long distance telephone bills and personally-maintained diaries of such employees relating to Kiesel Oil activities.

16. Any correspondence, files, records, analysis or other documents relating to laboratories utilized by Kiesel Oil, Larry Gooden and Lorraine "Pat" Kiesel or by any other companies or joint ventures in which Kiesel Oil, Larry Gooden, and Lorraine "Pat" Kiesel are involved.

17. Computerized records of any documents described in paragraphs 1 through 16 above, along with the documentation explaining operation of the computer system and any back-up tapes or discs.

Supreme Court, U.S.
FILED
FEB 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-870

In the Supreme Court of the United States

OCTOBER TERM, 1989

KIESEL COMPANY, INC., PETITIONER

v.

KIMBERLY HOUSEHOLDER, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to the pre-indictment return and exclusion of records seized by federal law enforcement agents in objective good faith pursuant to a search warrant issued by a federal district judge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 879 F.2d 385. The opinion of the district court (Pet. App. A16-A23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1989, and a petition for rehearing was denied on September 7, 1989. The petition for a writ of certiorari was filed on November 22, 1989. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action was brought by petitioner Kiesel Company to quash a search warrant issued by a federal district judge, to compel return of the records seized, and to exclude evidence obtained pursuant to the warrant from use in any future proceedings. Petitioner brought this action before any indictment was returned. The district court granted petitioner relief, but the court of appeals reversed. As of this date, no charges have been filed against petitioner.

1. The warrant for the search of petitioner's business premises was based on an extensive affidavit of respondent, a special agent of the Federal Bureau of Investigation, setting out alleged criminal violations of a variety of federal environmental statutes and the mail fraud statute by petitioner in the conduct of its used oil and hazardous waste operations.[1] As the court of appeals explained, "[t]he affidavit described numerous occasions of mixing waste oil contaminated with PCB with pure oil for resale and indicated that there was a wide pattern of such conduct," and it "contained charges that not only had tanks containing contaminated oil leaked on the premises, but that sludge from cleanup activities was buried on the premises." Pet. App. A6. The warrant was issued by District Judge Limbaugh and was executed by agents of the FBI and the Environmental Protection Agency on February 29, 1988. *Id.* at A2-A3, A6, A9.[2]

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[1] The warrant is reproduced at Pet. App. A24-A29.

[2] It is disputed whether the affidavit was present at petitioner's premises at the time of the search. Pet. App. A9, A21.

2. After the search, petitioner filed a motion pursuant to Fed. R. Crim. P. 41(e) to quash the warrant and for return of the property and related relief. That motion was heard by a different judge, District Judge Filippine.

The district court declined to exercise jurisdiction under Rule 41(e) and instead treated the motion as an independent action under its "anomalous" or equitable jurisdiction. Pet. App. A22.[3] The court rejected the government's argument that equitable jurisdiction to compel the pre-indictment return of property should be exercised only in exceptional cases, where it is shown that: (1) a government agent proceeded in callous disregard of the Fourth Amendment, (2) the movant would be irreparably injured if relief is not granted, and (3) the movant has no adequate remedy at law. *Id.* at A17, citing *Pieper* v. *United States*, 604 F.2d 1131 (8th Cir. 1979). Turning to the merits, the court concluded that the warrant was too broadly written and therefore violated the Fourth Amendment. The court quashed the warrant and ordered respondent to return the property seized. Pet. App. A14-A23. The court also "enjoin[ed] any federal agent from using in any proceeding information derived from the records or property while in the possession of the government agents pursuant to seizure under this search warrant," albeit without prejudice to the government's use of any evidence that might be properly obtained in the future. *Id.* at A22-A23. The court stayed the return of the property pending appeal. *Id.* at A23.

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[3] In the court of appeals, Judge McMillian attributed the term "anomalous jurisdiction" to the Fifth Circuit's decision in *Richey* v. *Smith*, 515 F.2d 1239, 1243 (1975). See Pet. App. A10 n.2 (McMillian, J., dissenting).

3. The court of appeals reversed the judgment of the district court and remanded the case with instructions to dismiss, concluding that the district court had acted prematurely in granting equitable relief. Pet. App. A1-A10.

a. The court of appeals agreed with the district court that petitioner's application for relief should be treated as a suit in equity, rather than a motion under Fed. R. Crim. P. 41(e). But it found that the district court had erred in failing to consider the three factors, cited above, that bore on the propriety of exercising equitable jurisdiction to order the pre-indictment return and exclusion of property. Pet. App. A4-A5. After weighing those factors, the court of appeals held that the district court had abused its discretion in awarding relief.[4]

First, the court of appeals found that petitioner had failed to show that the government acted in callous disregard of petitioner's Fourth Amendment rights. The court noted that respondent's "lengthy and detailed" affidavit established probable cause by describing a "broad range of illegal activity," and that the affidavit was presented to a federal district judge, who approved the search. Pet. App. A6. In these circumstances, the court concluded that the federal officers acted in objective good faith, rather than in callous disregard of petitioner's rights, in instituting the search. *Ibid.*, citing *United States* v. *Leon*, 468 U.S. 897, 923-925 (1984). Furthermore, in light of the showing made in the unsealed affidavit, the court

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[4] The court ordered respondent's affidavit in support of the search warrant unsealed (with sensitive information redacted), and it allowed the parties to file supplemental briefs addressing the contents of the affidavit. Pet. App. A9.

found no "callous disregard in the methods utilized in the search." Pet. App. A6.

Second, the court of appeals held that petitioner had failed to establish that it would suffer irreparable injury if relief was not granted. The court noted that petitioner had not made any factual showing that the seizure of records had hampered its ability to conduct its business, noting that the government had made provision for petitioner to have reasonable access to the records. Pet. App. A6-A7. The court also rejected petitioner's contention that the possibility that a future indictment might be based in part on evidence that was seized in violation of the Fourth Amendment justified relief. In the court's view, to allow the mere possibility of indictment to constitute irreparable harm for these purposes would too readily bypass the normal means of challenging allegedly unconstitutional searches and seizures—namely, a motion to suppress the evidence in the prosecution itself—and would convert what should be an extraordinary equitable remedy, to be used with restraint, into a "quite ordinary" one. *Id.* at A7-A8.

Third, the court of appeals ruled that the availability of a motion to suppress would in any event furnish petitioner an adequate remedy at law to challenge the search if a prosecution was instituted. Pet. App. A8.

b. Because none of the three factors informing the exercise of equitable jurisdiction had been satisfied, the court of appeals held that the district court abused its equitable discretion in ordering return of the property and enjoining its future use, and the court disposed of the case on that ground. Pet. App. A8, A10. But before doing so, the court of appeals commented on the district court's evaluation of the

search on the merits. *Id.* at A8-A9. The court noted that despite the general principle that a magistrate's determination of probable cause should be paid great deference by reviewing courts, the district court in this case had "failed to give any deference whatsoever to the initial determination of probable cause, which was made by another district judge of the same district." *Id.* at A8. The court of appeals pointed out that in this case, "[t]he reasonableness of the search is a close question, and the initial determination should have been weighed into the balance." *Id.* at A8-A9.

The court of appeals also stated that if it were to reach the issue, it would determine that the district court erred in finding the warrant to be overbroad, because the alleged offenses that were the subject of the investigation permeated petitioner's used oil and hazardous waste business. The court explained (Pet. App. A9):

> The affidavit described a pervasive pattern, extending over a period of time, of the mixture of used contaminated oil with fresh oil, and either accidental or intentional contamination of the premises with such oil. We would conclude that the warrant and search were fully supported by our earlier decision in *United States* v. *Kail*, 804 F.2d 441 (1986). In our view, the affidavits describe circumstances permeating the entire business operation, as in *Kail*, so as to support a determination of probable cause that the operation was permeated with illegal conduct occurring over a period of several years. The records dealing with [petitioner's] used oil and hazardous waste operations, which was the limitation placed on the warrant, were properly seized.

Finally, the court of appeals stated that before granting relief, the district court should have made a factual finding on whether the affidavit was present at petitioner's premises at the time of the search. Such a finding, the court explained, "might have channeled this case into a substantially different pattern than that presented" (Pet. App. A9).[5]

ARGUMENT

The court of appeals correctly held that petitioner failed to make a sufficient showing to warrant an exercise by the district court of its extraordinary equitable power to order the pre-indictment return of property and to bar any future use of the evidence seized. The holding below that petitioner is not entitled to relief in the circumstances of this case does not conflict with any decision of this Court or of any other court of appeals, and it presents no question warranting review by this Court.

1. a. The controlling feature of this case, which petitioner does not even address, is that the federal agents acted in objective good faith in executing a facially valid search warrant. In these circumstances, even if the warrant was overbroad, the evidence seized is not subject to exclusion in a criminal prosecution, and the court of appeals was therefore correct in reversing the district court's judgment requiring pre-indictment return of the property and barring use of any evidence derived from the search and seizure in any proceeding. *United States* v. *Leon*, 468 U.S. at 922-925.

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[5] Judge McMillian dissented. He believed that Eighth Circuit precedent did not require application of the three-factor test for the exercise of equitable jurisdiction and that the search was unconstitutionally broad. Pet. App. A10-A13.

The holding of *Leon* is based on the propositions that the purpose of the exclusionary rule is to deter improper police conduct and that this purpose would not be served by excluding evidence seized by law enforcement agents who acted in objective good faith pursuant to a facially valid warrant. *Leon*, 468 U.S. at 905-925. These propositions are as valid in the context of pre-indictment motions for the return and suppression of evidence, such as that in the present case, as they are in the context of post-indictment motions. Accordingly, every court of appeals that has considered the question has held that the holding of *Leon* applies to pre-indictment motions where the evidence at issue was seized pursuant to a warrant. *United States* v. *Roberts*, 852 F.2d 671, 675 (2d Cir.), cert. denied, 109 S. Ct. 556 (1988); *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747, 751-752 (9th Cir. 1989); *Floyd* v. *United States*, 860 F.2d 999, 1005-1006 (10th Cir. 1988). Cf. *United States* v. *American Investors of Pittsburgh, Inc.*, 879 F.2d 1087, 1106-1107 (3d Cir. 1989), cert. denied, 110 S.Ct. 368, 721 (1989).

Moreover, following the decision by the court of appeals, Rule 41(e) was amended to delete the language stating that if the motion for return of property is granted, the property "shall not be admissible in evidence at any hearing or trial." The Advisory Committee Note on this amendment explains that the deleted language concerning admissibility of the evidence was "only confusing" because it had not "kept pace" with the development of exclusionary rule doctrine, citing in particular this Court's decision in *Leon*. 45 Crim. L. Rep. 3021 (1989). Indeed, the Advisory Committee Note states that even prior to the 1989 amendment, the federal courts, relying

upon *Leon* and other exclusionary rule decisions, had "permitted the government to retain and to use evidence as permitted by the fourth amendment." *Ibid.* Thus, the recent amendments to Rule 41(e) now confirm the soundness of the uniform rulings by the courts of appeals that a movant is not entitled to suppression of evidence under Rule 41(e) where this Court's exclusionary rule decisions do not so require.

Under *Leon*, suppression will not be ordered unless the judge who issued the search warrant "abandoned his detached and neutral role" or the law enforcement officers "were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 926. Only the last of these conditions is alleged here—that the agents executing the warrant could not reasonably have believed it to be valid. The court of appeals, however, not only found that the agents acted in objective good faith (Pet. App. A6), but also expressed the view, albeit in dictim, that the warrant was valid (*id.* at A8-A9). The law enforcement agents cannot be faulted for coming to the same conclusion. Accordingly, the court of appeals correctly held that petitioner failed to establish a basis for the district court to exercise its extraordinary equitable jurisdiction to compel the return of the property and the exclusion of its use in any proceeding. That is especially so in view of petitioner's further failure to show that it is hampered in the conduct of its business by the government's continued possession of the records that were seized.

b. Petitioner objects (Pet. 5-6) to the analysis applied by the court of appeals in denying relief, and contends that its ruling conflicts with the Tenth Cir-

cuit's decision in *Floyd* v. *United States*, 860 F.2d 1003 (1988). As petitioner concedes (Pet. 5-6), however, this Court has held that a movant must make a showing of irreparable injury to support a motion to suppress evidence under Rule 41(e), on equitable grounds, in advance of any proceedings. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359-360 (1977), citing *Hunsucker* v. *Phinney*, 497 F.2d 29, 34 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975). And in *Floyd* v. *United States*, upon which petitioner principally relies, the Tenth Circuit likewise held that a showing of irreparable injury is required. 860 F.2d at 1005-1006.

Petitioner nevertheless asserts (Pet. 5) that the decision below conflicts with *Floyd* because the Tenth Circuit there held that a finding of irreparable harm was not precluded by the availability of a post-indictment motion to suppress. In fact, however, the Tenth Circuit in *Floyd* held that some showing of irreparable injury was required, and it then remanded for the district court to make that determination. In so doing, the Tenth Circuit specifically "express[ed] no opinion regarding this issue on remand," although it did offer some "guidance." That guidance consisted of nothing more than a rejection of the movant's argument that a violation of the Fourth Amendment is itself the sort of irreparable injury that warrants relief under Rule 41(e), since *Leon* permits use of evidence seized in good faith reliance on a warrant and since the purpose of the exclusionary rule is to deter unlawful police conduct, not to redress individual violations of the Fourth Amendment. 860 F.2d at 1005-1006. The Tenth Circuit stressed that "[i]nstead, irreparable harm refers to circumstances in which a Rule 41(e) movant can-

not wait for a legal remedy, thus justifying the court's equitable jurisdiction." *Id.* at 1006. Among the cases it cited for that point was the Eighth Circuit's decision in *Pieper* v. *United States*, 604 F.2d 1131, 1134 (1979), which it described as supporting the following proposition: "irreparable harm * * * if criminal indictment based on * * * illegally seized evidence appears imminent." But the Tenth Circuit in *Floyd* did not actually hold that irreparable harm would be established in that situation, since it earlier had made clear that it was not taking a position on the issue of irreparable harm, which was to be resolved on remand.[6]

Moreover, in *Floyd*, the government had instituted *civil* forfeiture proceedings, and there accordingly was no indication in the court's opinion that the possibility of an indictment was considered by either the court or the movant as a basis for a finding of irreparable injury. See 860 F.2d at 1003-1005 (discussing only civil remedies in the context of forfeiture proceedings, not a motion to suppress, as potentially adequate remedies at law that would preclude equitable relief under Rule 41(e)). The Tenth Circuit therefore had no occasion in any event to decide

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[6] Petitioner also cites (Pet. 5) *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F.2d 15, 18 (7th Cir. 1978). But as petitioner acknowledges, that case stands for the quite different proposition that irreparable injury could be established if the movant showed that he needed the seized currency to satisfy a tax liability. In *Center Art Galleries-Hawaii, Inc.* v. *United States, supra*, also cited by petitioner (Pet. 6), the Ninth Circuit held that the good faith exception to the exclusionary rule applies to motions for return of property under Rule 41(e). 875 F.2d at 751-752. That holding obviously does not support petitioner's argument for equitable relief here.

whether the possibility of indictment would constitute irreparable harm.

Petitioner also asserts (Pet. 5) that the decision below conflicts with *Floyd* because the latter decision did not require a showing of "callous disregard" for Fourth Amendment rights as a condition for awarding relief. However, where, as here, the search was made in objective good faith pursuant to a warrant, *Floyd* agrees with the court below (Pet. App. A6) that equitable relief is unavailable. 860 F.2d at 1006. It is not clear to what extent, if any, the "callous disregard" formulation used by the Eighth Circuit imposes any further requirement. Moreover, petitioner ignores the fact that *Floyd* was decided in the context of civil proceedings, while this case arises in the context of a criminal investigation. If equitable relief were ever to be available to bar the use of illegally seized evidence by a grand jury in deciding whether to return an indictment, but see *United States* v. *Calandra*, 414 U.S. 388 (1974), such relief should be granted only in the most extraordinary circumstances. Accordingly, if the "callous disregard" formulation requires more than a showing of an absence of objective good faith, such a standard would not necessarily be inappropriate as a precondition to the relief petitioner seeks.

2. Petitioner also argues (Pet. 7-10) that the court of appeals erred in finding the warrant in this case to be valid. Contrary to petitioner's view, however, the court of appeals' decision does not rest on a finding that the warrant is valid. See Pet. App. A8 (court states that it "disposed of the case on procedural grounds," even though it "comment[s] on the district court's approach to the merits").[7]

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[7] In the course of its discussion of the procedural issue, the court of appeals did conclude that the federal agents who

Petitioner's objections are without merit in any event. Petitioner argues that its used oil and hazardous waste business constituted only a portion of its activities and that although fraud may have permeated that portion, it did not permeate the entire business. Accordingly, petitioner believes that the court of appeals erred in concluding that an "all records" search in these circumstances was constitutional. See Pet. 7-9. The court of appeals, however, noted that the search warrant did not generally seek records of all aspects of petitioner's business, but rather sought evidence dealing only with its used oil and hazardous waste business. Thus, the court stated: "The records dealing with [petitioner's] used oil and hazardous waste operations, *which was the limitation placed on the warrant*, were properly seized. Pet. App. A9 (emphasis added). See *id.* at A24-A29 (reproducing the warrant).[8] Respondent's affidavit, filed in support of the search warrant, shows that petitioner's used oil and hazardous waste operations were permeated with fraud, and therefore

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executed the warrant acted in objective good faith. Pet. App. A6. Particularly in view of the fact that one district judge and two court of appeals judges believed that the warrant was valid, this fact-bound holding does not warrant review. Petitioner does not address this *Leon* issue.

[8] Most of the paragraphs in the search warrant are restricted to items involving the used oil and hazardous waste business, or related activities. See paragraphs 1, 3, 4, 5, 6, 7, 8, 10, 12, 13. (Paragraph 13 contains a typographical error. In context, it plainly refers to companies set out in paragraph 12, which are involved in the used oil and hazardous waste business.) The remaining paragraphs in the warrant refer to materials that are not specifically related to the used oil and hazardous waste business, but might reasonably be expected to provide evidence regarding fraud in that business.

a relatively broad warrant seeking the records pertaining to those operations was entirely appropriate. The decisions of other courts of appeals that are cited by petitioner are not to the contrary.[9]

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[9] *United States* v. *Offices Known as 50 State Distribution, Co,*. 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984), upheld a broad search warrant based on a showing that fraud permeated the business and that "[i]t was not possible through more particular description to segregate those business records that would be evidence of fraud from those that would not." 708 F.2d at 1374.

United States v. *Roche*, 614 F.2d 6 (1st Cir. 1980), upheld a district court determination that a search warrant was overbroad. The affidavit alleged fraud in the automobile insurance business, but the search warrant covered all records. The First Circuit held that the warrant was too broad because it was not limited to documents concerning the automobile insurance business. 614 F.2d at 7.

Voss v. *Bergsgaard*, 774 F.2d 402 (10th Cir. 1985), upheld a district court determination that search warrants were overbroad. The affidavit supporting the warrants showed probable cause to believe that the target had engaged in tax fraud, but the warrants themselves were not restricted to evidence relating to tax fraud. 774 F.2d at 404. The court cited *Roche* for the proposition that when a portion of a company's business is permeated with fraud, the search warrant should not go beyond that portion of the business. 774 F.2d at 406.

In *Center Art Galleries*, the affidavit showed evidence of fraud in the sale of forged Salvador Dali artwork. The warrant permitted seizure of virtually all materials on the premises, and "did not limit the warrants to items pertaining to the sale of Dali artwork despite the total absence of any evidence of criminal activity unrelated to Dali." 875 F.2d at 750. The district court (affirmed by the court of appeals) required the return of the materials seized, except for Dali artwork. 875 F.2d at 749.

Rickert v. *Sweeney*, 813 F.2d 907 (8th Cir. 1987), involved a warrant secured by the IRS for the seizure of all records

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1990

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from a business. The warrant limited the search only by reference to the general conspiracy statute, 18 U.S.C. 371, and a provision of the tax code, both of which the court held were too broad to provide any limitation on the warrant's scope. The court also found no evidence that the company was permeated with fraud. The court found that probable cause existed to search for the records of one particular project, and it remanded for a determination of which items were properly seized. 813 F.2d at 909-910.

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